**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect To Broadband Services | ) | |
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| Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II And *Computer Inquiry* with Respect to its Broadband Services | ) | |
| | ) | WC Docket No. 06-125 |
| Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) From Title II and *Computer Inquiry* Rules With Respect to its Broadband Services | ) | |
| | ) | |
| Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of *Computer Inquiry* and Certain Title II Common-Carriage Requirements | ) | WC Docket No. 06-147 |
| | ) | |
| Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services | ) | WC Docket No. 04-440 |

# COMMENTS IN OPPOSITION OF BROADVIEW NETWORKS, COVAD COMMUNICATIONS, CTC COMMUNICATIONS, INC., ESCHELON TELECOM, INC., NUVOX COMMUNICATIONS, XO COMMUNICATIONS, AND XSPEDIUS MANAGEMENT COMPANY LLC

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## SUMMARY

The Commission must deny each of the ILEC Petitions. Each of the ILEC Petitioners essentially claims that it is entitled to relief on the ground that Verizon's similar forbearance petition was "deemed granted" by operation of law. Contrary to the ILEC Petitioners' arguments, the deemed granted status of Verizon's petition does not bind the Commission to grant the forbearance relief that any of the ILEC Petitioners seek. Indeed, granting each of the ILEC Petitions on the basis of the deemed granted status of the Verizon petition would be inconsistent with the Commission's obligations under section 10 of the Act. Furthermore, since the Commission neither has not granted nor denied Verizon's petition on the merits, the Verizon petition is of no precedential value in this proceeding.

The Commission must evaluate each of the ILEC Petitions individually under the specific criteria set forth in section 10 of the Act. A review of each petition under this criteria demonstrates that each petitioner has failed to satisfy any prong of the statutory criteria for forbearance. As an initial matter, each petitioner has failed to define the relevant product and geographic markets, which is the first inquiry in a section 10 forbearance analysis. The ILEC Petitioners broadly claim that there is a single national broadband market, yet each petitioner has failed to demonstrate that the target services are substitutable for each other, that there are not meaningful distinctions among the types of services offered to different classes, that there are no distinctions between resale and wholesale offerings in which they operate, and that the competitors in these product markets operate on a nationwide basis. The services at issue are not substitutable for one another, but instead cover a wide range of speeds and levels of connectivity. The ILEC Petitioners, therefore, have failed to demonstrate the threshold requirement of identifying the relevant product and geographic markets.

The ILEC Petitioners also have failed to satisfy each of the enumerated statutory criteria for forbearance. Specifically, the ILEC Petitioners have failed to demonstrate that enforcement is not necessary to ensure that the charges, practices, and classifications are just, reasonable, and not unreasonably discriminatory. To the contrary, rates for both broadband and wholesale services will not be just, reasonable, and nondiscriminatory unless there is competition in each relevant product market. Enforcement of the Title II and *Computer Inquiry* requirements at issue also is necessary for the protection of consumers. If the Commission grants the ILEC Petitions, then the ILEC Petitioners will be able to foreclose all alternative providers from access to facilities that these providers need to reach their retail customers. Additionally, without access to the broadband transmission component that the ILEC Petitioners provide within their own territories, broadband competitors such as the Joint Commenters will be restrained in their ability to offer competitive alternatives. As a result, the reduction in competitive alternatives will harm consumers. Lastly, forbearance from applying the Title II and *Computer Inquiry* requirements is not in the public interest.

The Commission must deny each of the ILEC Petitions at issue in this proceeding.

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## COMMENTS IN OPPOSITION

Pursuant to the Public Notices issued by the Federal Communications Commission ("Commission") in the above-captioned proceedings,[1] Broadview Networks

[1] *Pleading Cycle Established for Comments on Qwest and AT&T Petitions for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services,* WC Docket No. 06-125, Public Notice, DA 06-1464 (rel. July 19, 2006), modified, *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Order, DA 06-1544 (rel. July 28, 2006). Pleading Cycle Established for

("Broadview"), Covad Communications ("Covad"), CTC Communications, Inc. ("CTC"), Eschelon Telecom, Inc. ("Eschelon"), NuVox Communications ("NuVox"), XO Communications, Inc. ("XO"), and Xspedius Management Company LLC ("Xspedius"), (collectively, the "Joint Commenters"), through their attorneys, file these comments in opposition to the forbearance petitions filed by AT&T Inc. ("AT&T"), BellSouth Corporation ("BellSouth"), Embarq Local Operating Companies ("Embarq"), and Qwest Communications ("Qwest") (collectively, the "ILEC Petitioners").[2]

As discussed herein, the ILEC Petitioners ask the Commission to rubber stamp their requests for forbearance from enforcement of Title II and *Computer Inquiry* requirements applicable to their packet-switched services capable of transmitting at speeds of 200 kbps and higher and non-TDM based optical networking, optical hubbing, and optical transmission services simply because such relief has been "deemed granted" to Verizon by operation of law. The Commission lacks authority to do so, and must consider all of the ILEC Petitions and the Verizon Petition, which remains pending, on their merits. The ILEC Petitioners, which bear the burden of proof under section 10 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 160, fail to address several gating issues and, accordingly, the Commission should

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Comments on Embarq Local Operating Companies' Petition for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements, WC Docket No. 06-147, Public Notice, DA 06-1545 (rel. July 28, 2006).

2 *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services* (filed June 13, 2006); *Petition of AT&T for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services* (filed Jul. 13, 2006); *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and the Computer Inquiry Rules with Respect to its Broadband Services* (filed Jul. 20, 2006). *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements* (filed Jul. 26, 2006), WC Docket No. 06-125 (consolidated) (collectively, the "ILEC Petitions").

deny all of their requests. Most egregiously, the ILEC Petitioners do not provide sufficient evidence either to demonstrate the relevant product and geographic markets in which they seek forbearance, or to allow the Commission to properly analyze their requests. In addition, the ILEC Petitioners have not submitted evidence to demonstrate that there is sufficient competition to warrant a grant of forbearance. The public interest demands that the Commission continue to apply Title II and *Computer Inquiry* requirements to the broadband services at issue here. The Commission should deny the ILEC Petitions expeditiously and should proceed to resolve the Verizon Petition in like fashion.

## I. INTRODUCTION

Over the past three years, at the behest the Regional Bell Operating Companies ("RBOCs") and other large incumbent local exchange carriers ("ILECs"), the Commission has taken numerous steps to dismantle the foundational regulatory requirements associated with the ILECs' provision of broadband services that were designed to promote the development of competitive telecommunications markets. The incorporation of ILEC high-capacity facilities and services, including the services for which forbearance is sought in the ILEC Petitions, into competitive services or bundles of services provided to competitors is an essential component of any would-be rival's efforts to provide competitive services in today's markets. The Commission's deregulatory measures, therefore, have made it increasingly difficult for companies, such as the Joint Commenters, to compete with the ILECs in the provision of high-capacity broadband services.

By way of background, in its 2003 *Triennial Review Order*, the Commission removed the unbundling requirements under section 251(c)(3) of the Act associated with high capacity, OC3 and higher loops and transport, and also substantially limited unbundled access to

fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the mass market.[3] Shortly thereafter, by its *Section 271 Broadband Forbearance Order*, the Commission ceased enforcing, through forbearance under section 10, less stringent, but nonetheless important to competitors, section 271 unbundling requirements applicable to similar high capacity transmission and switching facilities of the RBOCs.[4] Then, at the end of 2004, in its *Triennial Review Remand Order*, the Commission, subject to certain conditions, relieved the requirements for ILECs to unbundle DS1 and DS3 loops and transport under section 251(c)(3).[5]

The *Triennial Review Order,* the *Triennial Review Remand Order,* and the *Section 271 Broadband Forbearance Order* forced competitive providers of broadband services, including the Joint Commenters, to reassess their strategies and tactics for competing in the

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3 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-53, ¶¶ 272-95, & 17323, ¶ 541 (2003) ("*Triennial Review Order*"), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004). *See also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 19 FCC Rcd 20293 (2004) ("*Fiber to the Curb Reconsideration Order*"); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 19 FCC Rcd 15856 (2004).

4 *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC* Communications *Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) ("*Section 271 Broadband Forbearance Order*"), *affirmed EarthLink, Inc. v. Federal Communications Commission*, No. 05-1087 (D.C. Cir. Aug. 15, 2006).

5 *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2004) ("*Triennial Review Remand Order*"), *aff'd sub nom. Covad Communications Co. v. FCC*, Nos. 05-1095 et al., ___ F.3d ___ (D.C. Cir. 2006) ("*Triennial Review Remand Order*").

relevant markets given the strengthened hand of the large ILECs. As a result of these decisions, would-be competitors faced increased costs for many critical inputs of their broadband offerings, but they still were able to obtain those inputs from ILEC tariffs and through contracts with the ILECs subject to Title II and the *Computer Inquiry* requirements applicable to the ILECs. The rapidity with which the Commission adopted these decisions required competitors to make repeated adjustments over a relatively short timeframe and in an environment of building regulatory uncertainty.

Just when it seemed that a period of regulatory stability for competitive providers was on the horizon, a new spate of developments occurred, again in favor of the large ILECs and to the disadvantage of their much smaller competitors. Complementing determinations that cable modem services are not telecommunications services,[6] and ostensibly setting the stage for the relief the ILEC Petitioners presently seek, the Commission ruled in September 2005 that ILECs' wireline broadband Internet access services could be offered, at the discretion of the provider, either as telecommunications services subject to Title II regulation or as generally deregulated information services.[7] Finally, by failing to act within the statutory deadline, a Verizon petition for forbearance was "deemed granted" by operation of law in March of this year. The "grant" ostensibly relieved Verizon from enforcement of fundamental Title II and *Computer Inquiry* rules designed to protect consumers and foster competition.[8] In the wake of

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6 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002), *affirmed sub nom. Nat'l Cable & Tel. Ass'n v. Brand X Internet Service*, 125 S.Ct. 2688 (2005).

7 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*").

8 Federal Communications Commission, Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband

the Verizon Petition being "deemed granted," the ILECs Petitioners filed four "sister" petitions seeking a similar forbearance.

Rather than hastily granting the ILEC Petitions and eliminating the last vestiges of regulatory controls on the services and facilities at issue here, the Commission should allow time for the full ramifications of its recent deregulation to be felt and understood before taking additional actions that challenge the ability of the Joint Commenters and others to compete with the ILEC Petitioners in the broadband marketplaces. The ILEC Petitioners have offered little or no evidence that they are having difficulty succeeding famously in the broadband marketplace under the regulations they now seek to shed. Should the Commission grant Verizon and the ILEC Petitioners deregulatory relief too hastily, the development of robust competition in the broadband markets could be seriously hampered, to the detriment of consumers. Consequently, the Commission should deny the ILEC Petitions and should seize the opportunity to fulfill its obligations under section 10 by issuing a decision in WC Docket No. 04-440 explaining in writing its action on the Verizon Petition. The appropriate legal basis for these denials is set forth below.

## II. THE COMMISSION IS NOT OBLIGATED TO IMMEDIATELY GRANT THE ILEC PETITIONS BECAUSE VERIZON'S PETITION WAS DEEMED GRANTED

The ILEC Petitioners request the Commission to immediately forbear from applying, on a national basis, Title II of the Act and the Commission's *Computer Inquiry* rules to their broadband services analogous to the delineated broadband services of Verizon that were "deemed granted" forbearance. In the absence of market-specific facts supporting forbearance,[9]

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Services is Granted by Operation of Law (Mar. 20, 2006) ("March 20, 2006 News Release").

[9] As discussed below, the ILEC Petitions are deficient under the standards of section 10 and the Commission's earlier consideration of section 10 forbearance petitions.

the ILEC Petitioners rely almost entirely on the Verizon Petition having been "deemed granted" by operation of law, pursuant to section 10 of the Act. As explained herein, the Verizon Petition actually remains pending and its "deemed granted" status is not a basis for granting any of the ILEC Petitions.

The Commission has not acted to affirmatively grant or deny the Verizon Petition. The Commission never has issued a written statement confirming or rejecting a conclusion that the Verizon Petition satisfies the requirements of section 10.[10] The Verizon Petition, therefore, remains pending before the Commission, and its "deemed granted" status does not bind the Commission to grant the forbearance requested by any of the ILEC Petitioners. A grant of forbearance solely on the basis of Commission inaction on the Verizon Petition would be inconsistent with the Commission's section 10 mandate and, further, would violate the Administrative Procedures Act ("APA").

Rather than looking to its inaction with respect to the Verizon Petition as establishing some type of precedent that it must follow with respect to the ILEC Petitioners, the Commission now must address the merits of both the ILEC Petitions *and* the Verizon Petition, subject to the specific criteria set forth in section 10. Indeed, the statute expressly contemplates that the Commission shall grant or deny forbearance only on the basis of a reasoned decision, applying the market-based competition analysis that section 10 requires.[11] The Commission never

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10 *See Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-44 (filed Dec. 20, 2004) ("*Verizon Petition*"). The brief joint statement, barely exceeding a full page, of Chairman Kevin J. Martin and Commissioner Deborah Tate regarding Verizon's Petition does not provide a reasoned examination and analysis of the Petition sufficient to meet the requirements of section 10. *See* Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate (Mar. 20, 2006) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264436A2.pdf.

11 47 U.S.C. § 160.

has ordered full-scale Title II deregulation of an important segment of the telecommunications industry absent a granular review of market-based competition for specific products within specific geographic areas, and it should not do so here where the existence of stable competition has not been demonstrated. Consistent with well-established Commission precedent, the public interest demands that the Commission undertake a complete market-by-market review of the ILEC Petitions before forbearance relief may be granted to any of the ILEC Petitioners. The Commission should expeditiously deny forbearance to Verizon and to each of the ILEC Petitioners.

### A. Background: The Verizon Petition

On December 20, 2004, Verizon filed a petition with the Commission pursuant to section 10, requesting that the Commission forbear from applying Title II and the Commission's *Computer Inquiry* rules to all broadband services that Verizon provides nationwide. Verizon generally asserted that intermodal competition within the market for broadband services supported a grant of forbearance.

Verizon subsequently modified the scope of its request for forbearance. Verizon clarified that it sought forbearance only for non-TDM based broadband transmission services, capable of 200 kbps in each direction. Such services include: (1) Verizon's packet switched services (*i.e.*, Frame Relay services, ATM services, IP-VPN services, and Ethernet services); and (2) optical networking, optical hubbing, and optical transmission services provided by Verizon both over SONET-based networks and over Wave Division Multiplexing ("WDM") or Dense Wave Division Multiplexing ("DWDM") networks.[12] Verizon also clarified that it sought forbearance from application of common carrier obligations imposed by Title II and the

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[12] Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon to Marlene Dortch, Secretary, Federal Communications Commission at 2-3 (Feb. 7, 2006).

*Computer Inquiry* rules to Verizon's non-TDM based broadband transmission services.[13] Although the Commission never has issued an order on the Verizon Petition, by its News Release dated March 20, 2006, the Commission noted that the Verizon Petition, as amended, was "deemed granted" by operation of law under section 10(c) of the Act, effective March 19, 2006.[14]

### B. The Commission's Inaction on the Verizon Petition Does Not Constitute Binding Legal Precedent With Regard to the ILEC Petitions

The "deemed granted" status of the Verizon Petition does not supply the Commission with a legal basis to forbear from applying Title II and the *Computer Inquiry* rules as requested. The Verizon Petition is merely "pending," and its "deemed granted" status does not bind, and should not influence, the Commission with respect to the ILEC Petitions. If the ILEC Petitioners are to receive the forbearance they seek, which they should *not* based on the showings in the ILEC Petitions, the Commission must perform a substantive analysis of *each* request under section 10 of the Act. The Commission also must issue an order on the Verizon Petition that meets the requirements of section 10 and the APA. Thus, until such time as the Commission acts to grant or deny the Verizon Petition, on its merits, the Verizon Petition must be treated as pending before the Commission, and the forbearance "deemed granted" to Verizon only can be viewed as temporary or provisional and without precedential value.

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13 *Id.* at 3-4. By subsequent letter to the Commission, Verizon clarified that it does not seek forbearance from federal universal service obligations imposed on revenues from its provision of non-TDM based broadband transmission services. Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon to Marlene Dortch, Secretary, Federal Communications Commission (Feb. 17, 2006).

14 *See* March 20, 2006 News Release.

### 1. The Absence of a Commission Decision on the Verizon Petition Does Not Support the Relief Sought by the ILEC Petitioners

At the heart of the ILEC Petitions is the general notion that each of the ILEC Petitioners should be treated in parity with Verizon. More specifically, each seeks to have the Commission refrain from continuing to apply the requirements of Title II and the *Computer Inquiry* rules, which now govern their non-TDM based broadband transmission services, because Verizon is not subject to these requirements. This argument reduces to a simple and overly simplistic proposition: namely, the treatment of Verizon's Petition has precedential value that applies equally to the ILEC Petitioners, making a grant of the ILEC Petitions all but a foregone conclusion.

This argument is seriously flawed and manifests a gross misunderstanding of the role of precedent. Central to the application of precedent is the actual existence of the precedent itself, which only can follow *action* by a court or agency. Yet, the ILEC Petitioners argue that the Commission's *inaction* with respect to the Verizon Petition somehow creates a precedent that compels the Commission to grant similar relief to any later comer that seeks similar relief. By *not acting*, the Commission established no precedent.[15] The fact that Verizon's Petition currently has a "deemed granted" status did not occur as a consequence of any Commission decision. Rather, it occurred because the *statute* provides that the failure of the Commission to act within a set time frame on *any forbearance petition* would confer "deemed granted" status on that petition. If the ILEC Petitioners seek the same treatment that was accorded Verizon's Petition, then that treatment already is guaranteed by the Act, namely, if the Commission fails to

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[15] The ILEC Petitioners underscore the absence of precedent when they describe the Commission's inaction with regard to Verizon's Petition as leaving the industry in a state of uncertainty. *See, e.g.,* BellSouth Petition at 3-4; Embarq Petition at 5.

act on any of the ILEC Petitions within the time frames prescribed by section 10, the petition will be "deemed granted."

As explained herein, the Commission should not decline to act on the ILEC Petitions and let them, like the Verizon Petition, become "deemed granted." It should address and reject them on their merits. Similarly, the Commission should simultaneously address and reject the Verizon Petition in WC Docket No. 04-440.[16]

### 2. Granting the ILEC Petitions on the Basis of the Status of the Verizon Petition Would Be Inconsistent with the Commission's Section 10 Obligations

The Commission does not have authority to grant the ILEC Petitions on the basis of the "deemed granted" status of the Verizon Petition. To do so would violate the Commission's obligations under the Act. More specifically, under section 10, the Commission has authority to grant forbearance only if it performs each of two interrelated tasks. First, the Commission must "grant or deny... in whole or in part" any petition requesting forbearance, subject to and after consideration of each of the specific criteria set forth in section 10(a).[17] Second, the Commission must explain, in writing, its decision to grant or deny any petition requesting forbearance, as filed pursuant to section 10(c).[18]

Were the Commission to grant the ILEC Petitioners' requests on the basis of the status of Verizon's Petition, the Commission would violate both of these obligations. To issue such a grant, given the absence of a written decision on the Verizon Petition, would not under any circumstances demonstrate consideration, let alone satisfaction of, the criteria set forth in

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16 The need to resolve Verizon's Petition is all the more clear because the ILEC Petitions rely in part on the record created in that proceeding. *See, e.g.,* BellSouth Petition at 9; AT&T Petition at 5.

17 47 U.S.C. § 160(a).

18 47 U.S.C. § 160(c).

section 10(a). The status of Verizon's Petition as "deemed granted" cannot substitute for a thoughtful and detailed analysis of market definitions and an evaluation of the substantive statutory standards in light of market conditions.[19]

Further, notwithstanding the twelve-month time frame for Commission review of forbearance petitions prescribed by section 10(c), the plain language of the statute does not permit, under any circumstances, a grant of forbearance that is not supported by a reasoned determination that a petition requesting such relief satisfies each of the criteria set forth in section 10(a). Were the Commission to grant the ILEC Petitions on the basis of its failure to act on Verizon's Petition, it only would compound the error of its continuing failure to act, one way or the other, on the Verizon Petition. It would *not* be correcting an improperly discriminatory situation, as some of the ILEC Petitioners allege. Indeed, were the Commission to grant the ILEC Petitioners forbearance on the basis of the "deemed granted" status of Verizon's Petition *before* the end of the statutory period, the Commission in effect would be rewriting the Act to allow a forbearance petition to achieve "deemed granted" status *in advance of the period set forth by Congress*. The Commission cannot abrogate the role of the national legislature by shortening statutory time frames.

### 3. The Verizon Petition Remains Pending

Underscoring the impropriety of granting any or all of the ILEC Petitions on the strength of Verizon's "deemed granted" status is the inescapable fact that Verizon's Petition is still pending. Until the Commission completes each of the two statutory functions described in the previous section, the Commission's review of any petition requesting forbearance remains pending. To date, the Commission has fulfilled neither of the obligations imposed by section 10

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19 *See infra* Section III.

with regard to the Verizon Petition. Tellingly, the Commission's March 20, 2006 News Release states only that the Verizon Petition was "deemed granted by operation of law," and makes no reference to any action by the Commission on the merits of the Verizon Petition.[20] At bottom, section 10 compels the Commission to affirmatively conclude, and to explain in written form, that the Verizon Petition supports each of the criteria set forth in section 10, and further, that forbearance will promote competition among providers of telecommunications services, *or the Commission must reject the Verizon Petition.*[21]

The statute does not permit the Commission to take a pass on any obligation imposed by section 10. Although the statute provides that petitions requesting forbearance may be "deemed granted" in the absence of timely Commission action, such interim relief is not a form of Commission action and does not constitute a final action on the petition. Indeed, inherently, the "deemed granted" clause contemplates a failure of the Commission to grant or deny a petition for forbearance within a certain time. The triggering of the "deemed granted" clause as a result of the passage of time does *not* dispose of the Commission's continuing (and temporarily unfulfilled) obligation to grant or deny any forbearance petition, *on its merits*, through issuance of a written decision that addresses the three statutory criteria of section 10(a).[22] Stated differently, the "deemed granted" status of any petition is merely meant to be a provisional form of relief. Consequently, the Commission still can—and it must—either grant or deny the Verizon Petition.

The Commission's authority and obligation is clear because even an affirmative grant of forbearance is not an inherently permanent action. Forbearance is justified only so long

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20 March 20, 2006 News Release.

21 47 U.S.C. §§ 160(a), (b).

22 47 U.S.C. § 160(c).

as the criteria in section 10(a) are, *and continue to be*, met. A grant of forbearance by the Commission, or by operation of law, pursuant to section 10, does not abolish any existing legislative provision or Commission rule. Rather, consistent with the plain meaning of "forbearance," such relief implies only that the Commission shall "refrain from... enforcement" of a legislative provision or Commission rule where each of the circumstances set forth in section 10 of the Act is present.[23] Section 10 of the Act does not preclude future application and enforcement of the subject legislative provision(s) or Commission rule(s) where the Commission finds that the circumstances that would justify forbearance are no longer present.

The circumstantial nature of forbearance relief is made clear by the language in the statute describing forbearance relief. The action contemplated is Commission "forbear[ance] from applying any regulation or provision of this Act . . . ."[24] The statute does not equate forbearance with the repeal of a regulation or a statutory provision. But for the forbearance, the statutory provision or regulation would continue to apply. Moreover, under the Act, forbearance is appropriate only where the Commission determines that "enforcement . . . *is not necessary* to ensure that charges, practices . . . are just and reasonable and are not justly or unreasonably discriminatory," "enforcement . . . *is not necessary* for the protection of consumers," and "forbearance . . . *is consistent* with the public interest."[25] The statute's language makes clear that forbearance is appropriate only as long as the conditions cited persist. Should the circumstances change, the subject regulations and statutory provisions again should be enforced. In short,

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23 Webster's Tenth Collegiate Dictionary at 454 (2001) (the primary definition of "forbearance" is the "refraining from the enforcement of something (such as a debt, right, or obligation) that is due").

24 47 U.S.C. § 160(a).

25 47 U.S.C. §§ 160(a)(1)-(3).

forbearance is not a one-way street from which a service or carrier escapes from the application of certain Commission rules or the provisions of the Act once and for all.

This conclusion is especially *apropos* where, as here, the Commission did not act in the first instance, but where forbearance was "deemed granted" by operation of law. The Commission previously has expressed,[26] and the D.C. Circuit has affirmed,[27] that a grant of forbearance by operation of law as a result of Commission inaction under section 10(c) of the Act does not invalidate the Act with respect to the carrier or services that are the recipients of such relief. Specifically, defending its post-hoc order denying forbearance in *Core Communications, Inc.*, the Commission argued before the D.C. Circuit:

> In any event, none of the cases cited involved a law as sweeping as the section 160 [section 10] forbearance provision – authorizing forbearance from all statutory as well as agency regulatory requirements – and we are aware of no provision of the United States Code that is analogous to what Core's reading of the "deemed granted" clause in section 160(c) would produce... If the logic of the cited cases were applied to section 160, Commission inaction on a pending forbearance petition could effectively repeal the entire Communications Act as it applies to petitioning telecommunications carriers, without a written order for a court to review. Such a result is at least in tension with the Supreme Court's general observation on the subject of statutory deadlines that a "great principal of public policy *** forbids that public interests should be prejudiced by the negligence of officers or agents to whose case they are confided.[28]

Therefore, notwithstanding the relief "deemed granted" to Verizon, the Commission now may—and must—lawfully determine whether the forbearance relief requested by the Verizon Petition is mandated by the substantive provisions of section 10.

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26 Brief for Respondents, *Core Communications, Inc.*, 2006 W.L. 1789003 (D.C. Cir. 2006) (No. 04-1368).

27 *Core Communications, Inc.*, 2006 W.L. 1789003 (D.C. Cir. 2006).

28 Brief for Respondents, *Core Communications, Inc.* 2006 W.L. 1789003 (D.C. Cir. 2006) (No. 04-1368).

### 4. The Commission Should Issue a Reasoned Decision on the Merits of the Verizon Petition Simultaneously with Acting on the ILEC Petitions

Not only does the "deemed granted" status of the Verizon Petition preclude a Commission decision on the merits of the ILEC Petitioners' requests at this time, but also the Commission should issue an order on the Verizon Petition simultaneously with its decision on the merits on the ILEC Petitions. The Commission's failure to issue an order on the Verizon Petition may frustrate the efforts of interested parties who wish to appeal the forbearance grant.[29]

Leadership of Congressional committees focusing on telecommunications issues, in a letter to Chairman Martin, expressed concern that continued inaction by the Commission on the merits of the Verizon Petition potentially could jeopardize the rights of parties to appeal regulatory changes that substantially impact the services at issue here. Significantly, the letter condemns such "inaction" by the Commission as "an inadequate and inappropriate route for effectively approving a forbearance petition," and further proclaims that "Congress did not intend for Commission inaction to repeal the Communications Act or the applicability of the Administrative Procedures Act."[30] Consistent with section 10, the letter confirms that any relief granted by inaction of the Commission "must be read as temporary," until such time as the Commission affirmatively acts to grant or deny the petition (in whole or in part, via written explanation).[31]

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29 *CompTel v. FCC*, Case No. 06-1111 (D.C. Cir. filed Mar. 29, 2006) (appeal pending). ILEC Petitioners acknowledge the uncertainty created by the absence of a Commission decision on the Verizon Petition. *See* BellSouth Petition at 3-4; Embarq Petition at 5.

30 Letter from John D. Dingell, Member of Congress, Edward J. Markey, Member of Congress, Daniel K. Inouye, U.S. Senator, and Byron L. Dorgan, U.S. Senator to Kevin J. Martin, Chairman, Federal Communications Commission (July 24, 2006).

31 *Id.*

The APA expressly provides parties a right to seek judicial review of any action by the Commission that adversely affects them.[32] To facilitate judicial and further administrative review, the APA requires that any action of the Commission must be supported by a reasoned decision that such action is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[33] The absence of a written statement by the Commission addressing the merits of the Verizon Petition undermines this requirement. As stated above, the Chairman's Joint Statement with Commissioner Tate does not qualify as the necessary written statement. Additionally, as stated in the APA, judicial review of an action by the Commission suggests the necessity of a "final agency action."[34] Thus, absent grant or denial of the Verizon Petition, efforts to challenge the deemed granted status potentially are frustrated.

### C. The Forbearance Relief Requested by the ILEC Petitions is Not Necessary to Prevent Discrimination

Principles of non-discrimination and parity do not require the Commission to grant forbearance to the ILEC Petitioners. Nothing in the Act obligates the Commission to extend "deem granted" forbearance relief to later petitioners. As noted above, unless the Commission determines that each of the ILEC Petitioners independently satisfies the requirements of section 10, forbearance is unwarranted. Each petition must be evaluated on its own merits; it cannot simply be presumed that each is operating in the same product and geographic markets under the same competitive conditions as the others.

Further, despite the "promise" of arguments stated by some of the ILEC Petitioners, only Verizon is the current beneficiary of forbearance pursuant to the Act's "deemed

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32 5 U.S.C. § 702.

33 5 U.S.C. § 706(2)(A).

34 *See* 5 U.S.C. § 704. *See also* 28 U.S.C. §§ 2342, 2344 (Commission decisions reviewable "upon entry of a final order").

granted" clause.[35] The Verizon Petition is limited to the non-TDM based broadband transmission services that the Verizon Telephone Companies provide.[36] The Verizon Petition did not seek to demonstrate that any service provided by any other provider satisfies the requirements of section 10. Since the relief sought in the Verizon Petition is only "deemed granted" under operation of law, the extent of the "deemed granted" relief must be deemed coterminous with the relief sought in that Petition.

## III. THE ILEC PETITIONERS DO NOT SATISFY THE STATUTORY CRITERIA FOR FORBEARANCE

The ILEC Petitioners have failed to meet their burden of proving that the forbearance they seek in their respective petitions is required under section 10. There is no presumption in favor of forbearance, and the ILEC Petitioners have the burden of mustering the evidence necessary to warrant forbearance from enforcing the statute and regulations at issue. To apply the statutory criteria and consider the evidence, if any, offered by the ILEC Petitioners, the Commission first must define the relevant product and geographic markets. The ILEC Petitioners fail to do so, presuming without justification – and in contradiction with other recent filings by some of the Petitioners – that there is a monolithic national market for broadband services. The ILEC Petitioners *assume*, rather than *demonstrate*, that there is sufficient competition for the services in the relevant markets to render unnecessary continued application

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35 AT&T and BellSouth argue that the forbearance "deemed granted" to Verizon is tantamount to a grant of forbearance, on a national basis, for all non-TDM based broadband transmission services that the RBOCs provide or intend to provide. *See* BellSouth Petition at 3 & n.5. Although both AT&T and BellSouth have stated that they intend to demonstrate that the grant to Verizon extends to all RBOCs, they do not do so in their respective petitions, and their failure to do so speaks volumes.

36 Verizon Petition at 1, 24.

of the regulations at issue. Because the ILEC Petitioners fail to meet their burden under section 10, the Commission must deny each of the ILEC Petitions.[37]

### A. The Burden of Proof Lies with the ILEC Petitioners

Upon receipt of a petition for forbearance, section 10(a) gives the Commission authority to forbear from applying any regulation or provision of the Act to a telecommunications carrier if the Commission determines that:

> (1) enforcement of such regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[38]

The Commission must deny the petition unless the petitioner satisfies each of the above-listed criteria for forbearance.

There is no presumption in favor of forbearance. The language of the statute provides for forbearance *only where* the Commission makes a determination that enforcement is *not* necessary to achieve the ends described in subsections 10(a)(1) and (2). The presumption, if anything, is that enforcement of the statute and the Commission's regulations *are* necessary until such a specific determination is made by the Commission to the contrary. *If* there were a presumption in favor of forbearance, then Congress would have written the statute to provide

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37 Similarly, the Verizon Petition should be denied, albeit pursuant to separate order in WC Docket No. 04-440.

38 47 U.S.C. § 160(a). In determining whether forbearance is in the public interest, the Commission must evaluate whether forbearance will promote competitive market conditions. 47 U.S.C. § 160(b).

that forbearance *would be granted* unless the Commission determines that enforcement *is* necessary to achieve the stated aims. Congress did not do so.

In the absence of a presumption favoring forbearance, and given the statutory requirement that the Commission make certain affirmative determinations as a prerequisite to granting forbearance, it follows that the petitioner bears the burden of proof. Indeed, in the past, the Commission has placed the burden on forbearance petitioners to demonstrate that a regulation is no longer necessary.[39] The language of section 10(c) supports the conclusion that the petitioner has the burden: petitions are "deemed granted" (provisionally, as explained above) when the Commission fails to "deny the petition for failure to meet the requirements for forbearance."[40] In other words, under section 10, *the petition* – in this case the ILEC Petitions – must meet the requirements for forbearance. As demonstrated below, the Petitioners have failed to provide sufficient evidence to allow the Commission to make the determination set forth in section 10(a). Accordingly, the Commission must deny the ILEC Petitions.

### B. The Determinations Required for a Grant of Forbearance, As a Threshold Issue, Include the Definition of Relevant Product and Geographic Markets

To evaluate whether the ILEC Petitioners have satisfied the criteria set forth in section 10(a), the Commission consistently has defined the relevant product and geographic markets. Defining these relevant markets has been a touchstone of the Commission's competitive analysis for decades, and the Commission has applied this analysis specifically in section 10 forbearance proceedings. For example, in the *Qwest Omaha Forbearance Order*, the

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39 *See, e.g., Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 25 (1998) ("[T]he record does not show that today's market conditions eliminate all remaining concerns about whether broadband PCS providers' rates and practices are just, reasonable, and non-discriminatory.").

40 47 U.S.C. §160(c).

Commission began its analysis by examining and defining the relevant product and geographic markets:

> Specifically, section 10(a)'s mandate to forbear for a "telecommunications service, or class of . . . telecommunications service" in any or some of a carrier's "geographic markets" closely parallels the Commission's traditional approach under its dominance assessments to product markets and geographic markets, respectively. Accordingly, as we evaluate the regulations at issue pursuant to the section 10 standard below, our inquiry is informed by the Commission's traditional market power analysis.[41]

The Commission then explained that defining the relevant product markets involves "identifying and aggregating consumers with similar demand patterns."[42] Further, the Commission noted that "[a] geographic market aggregates those customers with similar choices regarding a particular good or service in the same geographical area," amplifying that "it would 'treat as a geographic market[] an area in which all customers in that area will likely face the same competitive alternatives for a product.'"[43]

Thus, for example, in the *Qwest Omaha Forbearance Order*, the Commission distinguished between mass market (residential and small-business) customers and enterprise market (medium-sized and large business) customers and conducted a separate analysis for each. Within those customer distinctions, the Commission looked at different classes of service (*e.g.*, switched access, special access, broadband Internet access). The Commission examined only products in the exchange access market, and did not look to the local exchange market as being part of the same product market. Further, the Commission did not treat the entire Omaha MSA

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41 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (2005) ("*Qwest Omaha Forbearance Order*"), *appeal pending sub nom Qwest Corp. v. FCC, et al.,* No. 05-1450 (D.C. Cir. filed Dec. 12, 2005).

42 *Id.* ¶ 18.

43 *Id.*

as the relevant geographic market; instead, the Commission treated the relevant geographic market as only those portions in which Qwest operated, noting that it was not making any findings with regard to other ILECs in the Omaha MSA.[44]

As the foregoing discussion illustrates, before the Commission can grant forbearance to any of the ILEC Petitioners, it first must determine the relevant product and geographic markets at issue.[45] None of the ILEC Petitions provide sufficient evidence for the Commission to reach a conclusion regarding the proper product or geographic markets. As a result, the ILEC Petitions stumble fatally out of the starting gate, and the Commission should deny each petition summarily for failure to satisfy this threshold requirement.

### C. The ILEC Petitions Are Devoid of Evidence Sufficient to Conclude That There Is a National Broadband Market

AT&T, BellSouth, Embarq, and Qwest each have failed to provide sufficient evidence to allow the Commission to define the relevant geographic and product markets associated with their requests. Instead, the ILEC Petitioners baldly assert that there is a monolithic broadband product market of national scope.[46] To support this contention, the ILEC Petitioners have the burden of demonstrating that the target broadband services are all substitutable for each other, that there are not meaningful distinctions between the types of services offered to different classes of customers for purposes of evaluating the product market, that there are no distinctions between retail and wholesale offerings and the markets in which

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44 *Id.* ¶¶ 21-24 & nn. 64 & 72.

45 Indeed, in *Earthlink v. FCC*, the court distinguished between an unbundling analysis under sections 251 and 271 and a dominant carrier regulation/market analysis under sections 201 and 202 of the Act. In doing so, the court acknowledged the market analysis that the Commission conducts in certain contexts. *See Earthlink v. FCC*, Slip Op. at 13, 15-16.

46 *See, e.g.,* AT&T Petition at 5; Qwest Petition at 7; Embarq Petition at 4. Even assuming there is such a single, all-inclusive relevant market for purposes of evaluating the ILEC Petitions, the ILEC Petitioners have failed to demonstrate that sufficient competition exists in that market to support forbearance.

they operate (*i.e.*, the same competitors that operate on a retail basis offer similar competitive alternatives to wholesale customers), and that the competitors in these product markets, including the ILEC Petitioners, operate on a nationwide basis. None of the ILEC Petitioners seriously attempts to make these cases. Instead, they assemble a montage of anecdotal information, often in copycat form, and substitute it for rigorous analysis.

The services at issue are not, on their face, obviously substitutable for one another. They cover a wide range of speeds and levels of connectivity. Some of the services might be unsuitable for small businesses with only one or a few locations, whereas others might only appeal to large, multi-location corporations. The ILEC Petitioners glaze over these potential distinctions to evade the sort of market-based analysis the Commission engaged in, for example, in the *Qwest Omaha Forbearance Order*,[47] in which the Commission declined to grant forbearance in the enterprise (medium-large business market) because Qwest had failed to provide sufficient evidence. The Commission summarily found "Qwest has submitted its case for a *broader product market*. Qwest has not provided sufficient data for its service territory for the entire MSA to allow us to reach a forbearance determination under section 10(a) for the enterprise market, and we therefore deny this aspect of the Petition."[48] Tellingly, the ILEC Petitioners similarly make a claim for a broader product market without even providing data regarding the areas where they operate.[49] In fact, reduced to the arguments' essentials, the

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47 *Qwest Omaha Forbearance Order* ¶ 50.

48 *Id.* (footnotes omitted) (emphasis added).

49 AT&T seems to narrow its Petition, at places, and suggest that it seeks relief only with respect to large and medium-sized enterprise customers. *See, e.g.,* AT&T Petition at 9, 12. But AT&T, like the others, sees the *Wireline Broadband Order,* which addressed wireline broadband Internet access services only predominantly within the mass market (as Embarq admits in its Petition at 9)—and not in the context of a forbearance analysis—as providing a rationale for deregulating different categories of broadband services provided to different types of customers and for different purposes. *See* AT&T Petition at 4.

ILECs appear to be arguing that, not only does the "deemed granted" status of the Verizon Petition compel grant of their claim for relief, but the *Wireline Broadband Order* does so as well.[50]

The differences between what the Commission addressed in the *Wireline Broadband Order* and the current situation are substantial. As an initial matter, the Commission acted to change its rules affecting wireline broadband Internet access in a rulemaking context, *not* pursuant to a section 10 forbearance proceeding.[51] Moreover, in the *Wireline Broadband Order*, the Commission addressed a very specific broadband application – ILEC wireline broadband Internet access – in which there were very clearly competitive providers using alternative means of delivery to wireline consumers, namely cable companies.[52] Despite the rhetoric regarding intermodal competition in the ILEC Petitions,[53] there is no evidence that cable companies – or VoIP, satellite, or wireless competitors – are providing, or are capable of providing, the sort of broadband services to medium-sized and large enterprise customers that are most likely to take the types of broadband and optical networking, hubbing, and transmission services described in the ILEC Petitions. AT&T, for example, lumps together VoIP, ATM, and Frame Relay services indiscriminately, but offers no evidence that these are substitutable

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50 *See, e.g.,* AT&T Petition at 3-5; BellSouth Petition at 3-4.

51 *Wireline Broadband Order* ¶ 81. The Commission forbore only to the limited extent of mandatory tariffing that would apply to providers of wireline broadband Internet access that chose to act as common carriers. *Id.* ¶¶ 91-93.

52 The Commission also noted emerging providers of broadband Internet access that used neither cable nor wireline facilities, namely wireless and satellite solutions. *Id.* ¶ 50 & n. 140.

53 *See, e.g.,* AT&T Petition at 16-17; Embarq Petition at 5. AT&T readily admits that Verizon is its main competitor. AT&T Petition at 16. *See also* Embarq Petition at 4, 9 (Verizon has a major share of "the market" and has dominated it along with AT&T and Sprint). Moreover, given the pending AT&T and BellSouth merger, these two RBOCs should not be considered separate competitors in any analysis in this docket of competitive conditions.

services, or that growth in VoIP offerings in any way relates to its claim of sufficient competition in Frame Relay and ATM services to warrant nationwide forbearance.[54] Rather, to the extent intermodal competition exists, it is in the mass market and it is limited to more traditional telecommunications services or Internet access services. There is no specific evidence in the ILEC Petitions to the contrary. In short, currently there is no alternative medium for obtaining the services targeted by the ILEC Petitioners.

Further, the fact that cable modem providers were found not to be regulated telecommunications providers played a large part in determining the outcome of the *Wireline Broadband Order*, given the significant competitive presence of cable modems relative to wireline Internet access solutions. Significantly, in the present proceeding, there is no analog to unregulated cable modem services. Ironically, the ILEC Petitioners attempt to cast *Verizon* in an analogous light, as a result of the "deemed granted" status it now enjoys for these services.[55] As discussed above, Verizon's status is the result of a statutory procedural default, in contrast with the established status of cable modem providers prior to the *Wireline Broadband Order.*

While there are other carriers that provide various broadband services to medium-sized and large enterprise customers, their offerings do not stand in the same position, even as a group, as cable modem alternatives did to wireline broadband Internet access. These providers, such as the Joint Commenters, in large measure, are wholesale customers of the ILEC Petitioners and Verizon.[56] As such, their efforts to provide competitive broadband services depend on the wholesale inputs – either the broadband services for which the ILEC Petitioners seek forbearance

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54 AT&T Petition at 13.

55 *See, e.g.*, Qwest Petition at 5; AT&T Petition at 4; BellSouth Petition at 8.

56 AT&T Petition at 9.

or the ILECs' special access services[57] – they obtain from the ILEC Petitioners and Verizon.[58] Thus, where these competitors rely on the ILEC Petitioners for inputs, their alternative service offerings cannot eliminate the need for continuing enforcement of Title II and *Computer Inquiry* regulation. These companies' continued ability to compete depends in large part upon sufficient regulation of the ILEC Petitioners.[59] For this reason, it would be a mistake for the Commission to proceed to consider the ILEC Petitions despite their absence of showing regarding relevant product and geographic markets and to ignore the impact of ILEC actions in the wholesale markets in ascertaining whether forbearance is appropriate in the retail market.[60] In sum, whatever the validity of the Commission's findings in the *Wireline Broadband Order* were regarding the broadband Internet access market(s), it has no relevance to identifying the relevant markets or the levels of competition in those markets that must be examined.

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57 AT&T acknowledges that these services are inputs to the services for which they seek deregulation. AT&T Petition at 23. AT&T contends that the Commission should not concern itself with special access services in this docket, but instead should deal with any concerns regarding these wholesale inputs to broadband services in it *Special Access Reform* proceeding. *Id.* at 24. The Joint Commenters urge the Commission not to adopt such a compartmentalized view. Settling on the proper treatment of special access services would be a critical prerequisite to any effort to deregulate a segment of the industry in which key emerging competitors rely upon such inputs. Rather than forge ahead with the ILEC Petitions as AT&T suggests, regardless of resolution in the *Special Access Reform* proceeding, the Commission should complete its review of special access services first.

58 Indeed, the extent to which some of the ILEC Petitioners compete against AT&T and Verizon depends upon the wholesale inputs of other ILEC Petitioners. In its 2005 10-K filings, BellSouth explained that its ability to provide competitive offerings to enterprise customers outside its region depends upon contracts it has reached with Qwest and Sprint. 2005 BellSouth 10-K at 11. (It is unclear to the Joint Commenters how the spin-off of Embarq affects BellSouth's contract with Sprint.)

59 Thus analysts' comments about the growth in IP-VPN services overlook the fact that the wholesale inputs for these new competitors come in large part from AT&T, Verizon and the other ILEC Petitioners. *See* AT&T Petition at 14.

60 Embarq, for example, encourages the Commission to examine only the retail market(s), pointing to the *Wireline Broadband Order*. Embarq Petition at 17. In the broadband Internet access markets, however, there was far less reason for the Commission to look at wholesale markets than there is here in the present circumstances since the ILECs had a formidable pure facilities-based competitors (cable companies) that had already captured a market share equal to or greater than the ILECs in many markets.

Indeed, recent statements to the Commission by two of the ILEC Petitioners undermine the existence of a single market for the broadband services at issue here. More specifically, in their respective petitions, AT&T and BellSouth each claim that they compete in a nationwide marketplace for the same services.[61] In their recent merger application, however, AT&T and BellSouth undermine this very assertion in an effort to convince the Commission that their merger will not have anti-competitive effect. There, AT&T and BellSouth try to paint the picture that, within BellSouth's operating region, they rarely compete against each other for the same types of business customers.[62] They contend that AT&T focuses on serving the largest business customers nationally and globally, while BellSouth concentrates only on local and regional customers, most of them significantly smaller than AT&T's "target customers."[63] AT&T and BellSouth, as merger Applicants, thus claim that there are distinct regional and national markets for enterprise services, and have urged the Commission to grant their merger application on the ground that each party provides service to a *different* market. The more recent forbearance petitions filed by these merger partners reveal their willingness to make statements depending upon current expediencies and demonstrate that the ILEC Petitioners' argument that there is a single nationwide broadband market in which all of them operate rings hollow.[64]

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61 BellSouth Petition at 9-12.

62 *Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T, Inc.*, WC Docket No. 06-74 and DA 06-904, at 64-67 (filed Mar. 31, 2006) ("*AT&T/BellSouth Merger Application*").

63 *Id.*

64 Industry reports also negate the claim that there is a single nationwide market, and make clear the need for the Commission to require the ILEC Petitioners to provide sufficient evidence to allow a meaningful analysis of both product and geographic markets. As an example, Gartner Research classifies BellSouth and Qwest as "niche" players in the broadband market(s), and groups AT&T and Verizon in an entirely separate category. *See* Gartner Research, Magic Quadrant for U.S. Network Service Providers, at 2 (May 11, 2006). While this report does not rigorously define the product markets it is discussing or evaluate whether there are separate local, regional or national markets,

Furthermore, in the recent merger of SBC and AT&T, the Commission analyzed competition for enterprise customers on several bases, because there are different types of enterprise customers. The Commission looked separately at large, medium, and small enterprise customers within the ILEC's territory.[65] It also analyzed enterprise customers with multiple locations within SBC's region.[66] and medium- and large-sized enterprise customers with national, multi-location operations, both within and outside of SBC's territory.[67] Notably, the Commission found that as the customers had more dispersed locations, there were fewer and fewer competitive alternatives to the largest telecommunications companies, as typified by AT&T and Verizon. These findings strongly suggest that before the Commission can determine whether competition is sufficient across different ranges of business customers to warrant forbearance with respect to all of them for all broadband services, the Commission first requires detailed market information from each of the ILEC Petitioners. To date, the ILEC Petitioners have not provided such data.[68] Until they do, the Commission should refuse to consider the ILEC Petitions.

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sufficient for a Commission-type competitive analysis which is called for here, the report does support the existence of a more heterogeneous set of marketplace conditions than are presented in the ILEC Petitions.

65 *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶¶ 69-71 (2005) ("*SBC-AT&T Merger Order*").

66 *Id.* ¶ 73.

67 *Id.* ¶¶ 72, 74. The Commission performed a similar evaluation in reviewing the merger application of MCI and Verizon. *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶¶ 69-74 (2005) ("*Verizon-MCI Merger Order*").

68 Embarq relies repeatedly on the fact that it is much smaller than Verizon, which has been "deemed granted" forbearance relief, as a grounds for forbearance. Embarq Petition at 8-9, 16. Qwest makes a similar argument. Qwest Petition at 6, 12. Additionally, their size on a nationwide comparison, if the examination occurs within appropriate geographic markets, which may be for some (or all) relevant products, be on the scale of MSAs, Embarq and Qwest may, in those markets where it operates, be the largest competitor.

### D. Assuming There Is a National Broadband Market, the ILEC Petitioners Have Failed To Demonstrate That Circumstances Justify Forbearance

Assuming *arguendo* that a single broadband market exists, the ILEC Petitioners also have failed to demonstrate that there is ample competition in that market to grant forbearance. The ILEC Petitioners rely on broad Commission statements taken out of context, and the allegedly sufficient record created in the Verizon proceeding.[69]

For example, AT&T points to the recent AT&T and Verizon merger orders as providing evidence that there is nationwide competition in the broadband market.[70] As an initial matter, the Commission's analysis was not performed for section 10 purposes and the potential removal of fundamental common carrier regulation. Nevertheless, in light of the present claims for recognition of a national, single product marketplace, the Commission in its merger orders primarily examined the SBC and Verizon territories and, as noted earlier, found fewer competitive choices for medium- and large-sized enterprise customers.[71] Significantly, in conducting its merger analysis, the Commission found sufficient competition existed, in part, because it could assume that Title II and *Computer Inquiry* regulations would continue to apply to the post-merger companies. It is an unwarranted extrapolation to use the Commission's merger analysis to maintain that the Commission already has found sufficient competition to justify complete deregulation of broadband services for Verizon and the ILEC Petitioners within

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69 *See, e.g.,* AT&T Petition at 12, n. 32 (citing *Verizon 2/7/06 Ex Parte,* WC Docket 04-440).

70 AT&T Petition at 11-12.

71 *Verizon-MCI Merger Order* ¶ 75; *SBC-AT&T Merger Order* ¶ 74 ("Although we find that medium-sized and large enterprise customers with national, multi-location operations do not have as many competitive options, we nevertheless conclude that this merger is unlikely to cause competitive harm to this market").

their respective territories.[72] It is inescapable that the ILEC Petitioners utterly fail to provide meaningful data on the competitiveness of the market(s) that would justify the radical relief sought.

Several of the ILEC Petitioners note that Verizon provided a list of broadband competitors in an *ex parte* in WC Docket No. 04-440 as a demonstration of the robust competition for the services for which it sought forbearance.[73] Many of these competitors, however, rely upon the resale of ILEC services at issue or ILEC transmission services to provide their broadband services, which raises the separate but critical question of whether there is sufficient wholesale competition, a matter the ILEC Petitioners largely avoid. When they do address it, they usher arguments that the Commission found that sufficient competition exists in the wholesale markets, in many cases, to eliminate unbundling requirements or that UNEs will exert sufficient downward pressure on special access rates.[74] Despite the ILEC Petitioners' insinuations, although the Commission determined unbundling no longer was required, the Commission did *not* make a concomitant finding competition was great enough that Title II regulation was no longer warranted for any of the transmission inputs for which unbundling was no longer justified. The ILEC Petitioners should not be permitted to bootstrap the Commission's finding of non-impairment for certain facilities, to an argument that Title II regulation is no longer required.

Moreover, the behavior of the largest of the ILEC Petitioners after the SBC-AT&T merger was approved strongly favors caution on the part of the Commission. More

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72 AT&T's statement about no significant differences in level of competition in different parts of the country totally unsupported by any citations or data. *See* AT&T Petition at 13.

73 AT&T Petition at 12; BellSouth Petition at 11.

74 *See, e.g.,* AT&T Petition at 12; BellSouth Petition at 10.

specifically, in the seven months following its merger's closure, AT&T has raised prices for its Local Private Lines for the legacy SBC nine times, or more than once a month.[75] The rate increases cover six states and range from a low of 5.8% to a high of 20.6% for various components of the service, all at broadband equivalent speeds.[76] These examples amply demonstrate that competition is not strong enough to restrain the ILEC Petitioners from raising rates for wholesale transmission inputs, even assuming the continued application of the regulation for which the ILECs now seek forbearance.

Furthermore, AT&T, BellSouth, Qwest, and Embarq do not even attempt to demonstrate with any supporting data – other than citing proceedings that dealt with different services or were conducted for different purposes under different legal standards – that the statutory criteria for forbearance has been satisfied. BellSouth, for example, provides only one paragraph to explain how it allegedly meets the first two prongs of section 10(a). At bottom, there is insufficient evidence for finding that the ILEC Petitioners satisfy any of the three statutory criteria.

### 1. Enforcement Is Necessary to Ensure that the Charges, Practices, and Classifications are Just, Reasonable, and Nondiscriminatory

None of the ILEC Petitioners has satisfied the statutory burden of demonstrating that enforcement is unnecessary to ensure that its charges, classifications and practices for

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75 *See* AT&T Accessible Letters dated May 5, 2006 (RATE CHANGES DS1 Service – Missouri), April 25, 2006 (RATE CHANGES Fractional DS1 Service – IL, IN, OH, WI), April 24, 2006 (RATE CHANGES DS1 Service – IL, IN, OH, WI), April 24, 2006 (RATE CHANGES DS3 Service – IL, IN, OH, WI), January 6, 2006 (RATE CHANGES Ds3 MTM and Service Packs Rate Changes – Illinois, Michigan), January 10, 2006 (RATE CHANGES DS3 MTM and Service Packs Rate Changes Revision – Illinois, Michigan), December 21, 2005 (RATE CHANGES DS1 Service – Illinois, Michigan), February 20, 2006 (RATE CHANGES Megalink III (DS1) Service – Texas), February 17, 2006 (RATE CHANGES Megalink III (DS1) Service – Texas) at https://clec.att.com/clec/accletters/home.cfm.

76 *Id.*

making available the broadband services for which it seems forbearance from regulation from will remain just, reasonable, and nondiscriminatory. Rates for both broadband and wholesale services will not be just, reasonable, and nondiscriminatory unless there is competition in each relevant product market. As explained above, most of the non-ILEC competitors for the broadband services at issue here rely upon wholesale inputs from the ILEC Petitioners, either in the form of finished broadband services or transmission service, such as special access. As demonstrated above, recent experience with AT&T and Verizon shows that a lessening of regulation has led to *multiple increases*, not a decrease, in the prices for critical inputs the RBOCs claimed were subject to sufficient competitive alternatives. The ILEC Petitioners fail to make the case that the result would be different here.

### 2. Enforcement Is Necessary for the Protection of Consumers

The ILEC Petitioners also have failed to demonstrate that enforcement of the Title II and *Computer Inquiry* requirements is unnecessary for the protection of consumers. If AT&T, BellSouth, Qwest, and Embarq are not required to comply with the Title II and *Computer Inquiry* and requirements, then they will be able to foreclose all alternative providers from access to facilities needed to reach their customers. Since the ILEC Petitioners do not demonstrably currently compete within the others' territories (and with the pending merger of AT&T and BellSouth), there is no evidence that competitors will have the option of multiple suppliers from among the petitioners. Without access to the broadband transmission component that the ILEC Petitioners provide, broadband competitors such as the Joint Commenters will be restrained in their ability to offer competitive and innovative alternatives to customers. Assuming that the ILEC Petitioners would continue to provide service to their rivals after a grant of forbearance, there is no question that they will have unrestrained incentives do so at substantially increased

rates so as to squeeze the competition out of their respective markets. The reduction in competitive alternatives will certainly harm consumers.

Furthermore, if the Commission forbears from enforcing Title II requirements, the Petitioners will not be required to provide these services to requesting providers at rates, terms, and conditions that are just and reasonable and not unreasonably discriminatory,[77] and users no longer will have any recourse against anticompetitive behavior. Therefore, in the face of the ILEC Petitioners' emaciated showing of competition across the full range of broadband services, for the full range of potential users, in all geographic markets, continued enforcement of the Title II and *Computer Inquiry* requirements is necessary for the protection of consumers.

The ILEC Petitioners contest that forbearance is necessary under this prong to allow them to respond quickly and flexibly to the demands of their customers.[78] There is no clear support for AT&T's or Qwest's arguments that forbearance would lead to the introduction of new services and responsiveness to competitor demands.[79] To the contrary, with reduced access to broadband services, competitors likely will be unable to obtain economic access to the facilities that they need to be able to provide broadband services. Accordingly, granting forbearance to the ILECs would result in a decrease of broadband opportunities not an increase.

The suggestion that the ILEC Petitioners are incapable of competing in the broadband services arena effectively carries with it a substantial burden. If this were truly the case, then the ILEC Petitions are strangely devoid of any current market data suggesting that regulation has prevented them from obtaining and maintaining a dominant share of customers for their broadband services, particularly within their operating territories. As noted above, the

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77 47 U.S.C. §§ 201, 202.

78 *See* AT&T Petition at 6; BellSouth Petition at 5-6,14; Qwest Petition at 13, 18-19.

79 *See* AT&T Petition at 25.

RBOCs consider Verizon and the ILEC Petitioners to be their primary competitors. At most, as AT&T suggests, the ILEC Petitioners may not able to respond to customer demands as quickly as Verizon could as long as Verizon remains in "deemed granted" status.[80] The solution is not to rubber stamp the ILEC Petitions, but to address each on its merits, as well as the pending Verizon Petition.

### 3. Forbearance from Applying the Title II and the Computer Inquiry Requirements Is Not in the Public Interest

None of the ILEC Petitioners has demonstrated that forbearance from Title II and the *Computer Inquiry* requirements is in the public interest. To satisfy this prong of the required forbearance analysis, AT&T, BellSouth, Qwest, and Embarq *each* must demonstrate that forbearance will promote competitive market conditions in their particular market.[81] Forbearance will not promote competitive deployment in the non-TDM-based broadband services market, either in the wholesale or retail market. As stated above, there are not adequate alternatives to the ILEC broadband transmission services to prevent rate increases and promote competition. Furthermore, there is no evidence that forbearance will encourage competitors to deploy additional broadband transmission facilities.

Forbearance also is not the public interest because it will lead to increased end user rates and decreased competitive alternatives in the retail market. The Commission previously has found that forbearance is not in the public interest where, as here, it is likely to lead to increased rates for wholesale services that competitors need to serve their end user

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80 *See id.* at 3, 6.

81 47 U.S.C. §160(b) (stating that in making the determination of whether forbearance is in the public interest, "the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions.").

customers.[82] If the Commission were to forbear here, then the ILEC Petitioners would be able to exercise their dominance and provide broadband transmission facilities (*if* they chose to provide those facilities in the first instance) at substantially increased rates from their current offerings, just as AT&T has done following its merger. It is unlikely that providers would be able to absorb the rate increases, and ultimately would need to pass these along to their end user customers.

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82 *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, FCC 99-397 ¶ 63 (rel. Dec. 30, 1999).

## IV. CONCLUSION

For the foregoing reasons, the Commission should find that the "deemed granted" status of the Verizon Petition does not warrant a grant of the ILEC Petitions, but instead the ILEC Petitions must be considered on their own merits. In addition, the Commission should deny each of the ILEC Petitions in their entirety for failure to provide sufficient evidence to demonstrate the existence of a single national broadband market cutting across all of the services in the ILEC Petitions or to allow the Commission to define the relevant product and geographic markets. Alternatively, the Commission should deny the ILEC Petitions because the ILEC Petitioners have failed to show the existence of sufficient competition to warrant forbearance under the section 10(a) and (b) criteria.

Respectfully submitted,

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**ESCHELON TELECOM, INC.**
**NUVOX COMMUNICATIONS**
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August 17, 2006

## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2006, a true and correct copy of the foregoing COMMENTS IN OPPOSITION was delivered by first-class mail, postage prepaid, unless otherwise specified, upon the following:

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